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Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-examining Current Ethical Standards

Mark L. Tuft

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SUPERVISING OFFSHORE OUTSOURCING OF LEGAL SERVICES IN A GLOBAL ENVIRONMENT: RE-EXAMINING CURRENT ETHICAL STANDARDS

*Mark L. Tuft**

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I. INTRODUCTION

A recent series of ethics opinions has given a boost to outsourcing legal and non-legal support services domestically and abroad.¹ The opinions conclude that lawyers may ethically outsource legal work provided the outsourcing lawyer remains ultimately responsible for the work and satisfies supervisory responsibilities under existing ethics rules.²

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1. See *infra* notes 5 and 6 and accompanying text.

2. See *infra* notes 5 and 6 and accompanying text.

At the same time, the legal profession has been taking a fresh look at the way technological advances and globalization are likely to reshape the way law firms function and the corresponding ethical responsibilities of lawyers associated in the firm. New ways of outsourcing legal work through the Internet and other technologies are being explored, including offshoring and multi-sourcing strategies that go beyond support services and paraprofessional assistance. Emerging technologies by outsourcers and other entrepreneurs are expected to be capable of providing pieces of legal work that compete with and, in some cases, may replace traditional work of lawyers. The classic law firm business model is being challenged. Firms are under increasing pressure to reduce internal costs of performing routine legal services not only in the current economic downturn but also as a means of surviving in the long term. Recent developments abroad allowing certain forms of outside investment in law firms are also predicted to have a dramatic effect on organizational and management strategies of law firms in the United States. On a broader front, the ABA has launched Ethics 20/20 to study how law practice is being transformed by technology and the regulation of the legal profession in the context of globalization. The newly formed commission will review the Model Rules, including provisions in the “5” series³ that address law firm operations to determine what changes need to be made.

Ethical concerns in outsourcing legal work have been fairly well developed in ethics opinions and articles on the subject.⁴ It is generally accepted that the outsourcing lawyer has an obligation to manage the outsourcing arrangement to avoid ethical violations.⁵ Most ethics opinions conclude that the risks involved are capable of being managed through competent representation and proper supervision.⁶ However,

3. MODEL CODE OF PROF'L CONDUCT R. 5.1 – .7 (2009).

4. See *infra* notes 5 and 6 and accompanying text.

5. See, e.g., Alison M. Kadzik, Current Development 2005-2006: *The Current Trend to Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices*, 19 GEO. J. LEGAL ETHICS 731, 736 (2006); Jaynanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189 (2007); Eileen Libby, *A Qualified Yes, U. S. Lawyers May Manage Outsourcing Arrangements to Avoid Ethics Concerns*, 94 A.B.A. J. 32 (2008); Kathryn A. Thompson, *Still the Boss: Firms Must Retain Supervision of Employees Under Outsourcing Arrangement*, 92 A.B.A. J. 26 (2006).

6. The Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-3 (2006); Los Angeles County Bar Ass'n Prof'l Responsibility and Ethics Comm., Formal Op. 518 (2006); San Diego County Bar Ass'n Legal Ethics Comm., Formal Op. 2007-1 (2007); N.C. State Bar, Formal Op. 12 (2008); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008); Fla. State Bar Ass'n Comm. on Prof'l Ethics, Proposed Advisory Op.

the opinions are not consistent on what the duty of supervision is in the context of outsourcing legal work abroad. Some express the view that to avoid aiding in the unauthorized practice of law, foreign lawyers should be treated as non-lawyer assistants.⁷ Under this view, the duty of supervision is governed by ABA Model Rule 5.3, which requires that reasonable efforts be made to ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer outsourcing the work.⁸ On the other hand, the obligation to supervise lawyers to whom work is outsourced overseas, depending on the arrangement, may be governed by Model Rule 5.1. Rule 5.1 obligates the supervising lawyer to make reasonable efforts to ensure that another lawyer under the supervisor's authority conforms to the applicable ethics rules.⁹ The rule also requires that partners and lawyers possessing comparable managerial authority in a law firm make reasonable efforts to ensure that the firm has measures in place that give reasonable assurance that all lawyers in the firm conform to the rules.¹⁰ The outsourcing of legal work by U.S. firms has sometimes been compared to the use of temporary lawyers.¹¹ The ABA addresses the ethical implications of working with temporary lawyers in Formal Opinion 88-356.¹² However, the opinion focuses on domestic temporary lawyers and does not adequately address the duty of supervision under Model Rule 5.1.¹³

There are many forms of legal outsourcing that range from outsourcing administrative and support functions to outsourcing legal and law-related services domestically and abroad to "offshoring," in which a firm relocates certain legal and law-related services to a foreign jurisdiction that allows the firm to realize greater efficiency and lower costs.¹⁴ The question is whether a distinction between the duty of

07-2 (2007); Ohio Supreme Ct. Bd. of Commissioners on Grievances and Discipline, Formal Op. 2009-6 (2009); Colorado Bar Ass'n Formal Op. 121 (2009).

7. New York City Bar Comm. Formal Op. 2006-3, *supra* note 6.

8. MODEL CODE OF PROF'L CONDUCT R. 5.3.

9. MODEL CODE OF PROF'L CONDUCT R. 5.1.

10. *Id.*

11. *E.g.*, Kadzik, *supra* note 5 at 734.

12. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988). The opinion defines "temporary lawyer" as a lawyer engaged by a law firm for a limited period, either directly or through a lawyer placement agency. *Id.* n.1.

13. *See id.*

14. A consensus on terminology has developed in this growing area of globalization. "Outsourcing" implies that the work will be provided by a person or entity outside the law firm and within the jurisdiction of the United States. "Offshore outsourcing" implies that the work will be provided by a person or company outside the United States. "Offshoring" legal work, on the other hand, occurs when a firm relocates certain of its activities to a location abroad. *See* Mary C. Daly and Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of*

supervision over the work of foreign lawyers and domestic lawyers will continue to be valid in the changing global legal environment and whether the ethical obligations under the current rules for partners, managers, and supervisory lawyers in the traditional law firm setting will remain workable when it comes to outsourcing legal work abroad.

II. THE TRADITIONAL DUTY OF SUPERVISION

Partners in a law firm and lawyers with comparable managerial authority in the firm have a responsibility to oversee the conduct of lawyers within the firm.¹⁵ Lawyers who have managerial authority over the professional work of a law firm include partners, shareholders, members of other associations authorized to practice law, and lawyers with comparable managerial authority in a legal services organization, a corporate law department, or a private governmental agency. Even lawyers with intermediate managerial responsibilities in a firm have general supervisory responsibilities under Model Rule 5.1(a).¹⁶

Critical to ascertaining the general supervisory responsibilities of partners and lawyers having comparable managerial authority is determining what constitutes a law firm.¹⁷ Whether lawyers associated in a practice constitute a law firm under the rules depends on the specific facts and the underlying purpose of the rule that is involved. Foreign lawyers performing work under offshore outsourcing arrangements have not been determined to be lawyers in the firm for purposes of Model Rule 5.1(a). On the other hand, the ABA has said that the question of whether a temporary lawyer is associated in or within a firm is determined by “a functional analysis of the facts and circumstances

Offshoring Legal and Law-Related Services, 38 GEO. J. INT'L L. 401, 427-28 (2007); see generally *Guidelines Regarding Offshoring Legal Services*, issued by the Florida Bar Ethics Department in connection with Fla. State Bar Ass'n Comm. on Prof'l Ethics, Proposed Advisory Op. 07-2 (2007); Alex Aldridge, *Offshoring-Outside the Box?*, Legal Week, May 14, 2009 (reporting on recent decisions by several domestic law firms to use external lawyers in foreign jurisdictions for certain litigation-related and corporate due diligence work as a cost-saving measure).

15. MODEL CODE OF PROF'L CONDUCT R. 5.1(a) (2009) (“A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”).

16. MODEL CODE OF PROF'L CONDUCT R. 5.1, cmt. 1.

17. The ABA defines a “law firm” under the Model Rules as “a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.” MODEL CODE OF PROF'L CONDUCT R. 1.0(c) (2009).

involved in the relationship between the temporary lawyer and the firm consistent with the purposes for the Rule.”¹⁸

The ABA decided in Formal Opinion 88-356 that, depending on the facts, a temporary lawyer may or may not be considered “associated” with a law firm for purposes of the imputed disqualification rule (recommending that the firm screen temporary lawyers from other representations).¹⁹ The opinion also concludes that lawyers hiring temporary lawyers to perform independent work for a client without close supervision must obtain the client’s consent after full disclosure, but would not need to obtain the client’s consent if the temporary lawyers worked under the direct supervision of a lawyer associated with the firm.²⁰ It is possible that foreign lawyers to whom legal work is outsourced could eventually be viewed as temporary lawyers in a changing global legal environment. However, Formal Opinion 88-356 is explicitly limited to domestic temporary lawyers and does not address questions of supervision raised by offshoring or outsourcing legal work to foreign lawyers.²¹

Apart from whether the general supervisory obligations of partners and lawyers with comparable managerial authority apply in regard to outsourcing arrangements, individual lawyers who outsource legal work are responsible for ensuring that the tasks are performed competently and otherwise conform to that lawyer’s own ethical obligations. A lawyer having direct supervisory responsibility over another lawyer has an obligation to make reasonable efforts to ensure that the other lawyer complies with the applicable ethics rules.²² The duty of supervision by a lawyer with direct supervisory authority over another lawyer is not limited to lawyers who are employed by or otherwise associated in the firm. Thus, lawyers with direct supervisory authority have an obligation to make reasonable efforts to ensure that a temporary lawyer conforms

18. ABA Formal Op. 88-356, *supra* note 12. The ABA Committee found there is no substantive difference between lawyers “associated in” a firm and lawyers “associated within” a firm for the purpose of imputing conflicts of interest. *Id.* n.5.

19. *Id.*; MODEL CODE OF PROF’L CONDUCT R. 1.10 (2009) (imputation of conflict of interest: general rule).

20. ABA Formal Op. 88-356, *supra* note 12.

21. *Id.*; The ABA recommends that in doubtful cases, it is relevant to consider the purpose of the rule that is involved in deciding whether lawyers associated together constitute a law firm. MODEL CODE OF PROF’L CONDUCT R. 1.0, cmt. 2 (2009).

22. MODEL CODE OF PROF’L CONDUCT R. 5.1(b) (2009) (“A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.”).

to the rules, even if the temporary lawyer is not considered a member of the firm.²³

A lawyer's obligation to supervise non-lawyer assistants differs from the duty to supervise other lawyers. Model Rule 5.3(b) requires the responsible lawyer to make reasonable efforts to ensure that the non-lawyer's conduct is "compatible" with the professional obligations of the lawyer,²⁴ while Rule 5.1(b) requires reasonable efforts to ensure that lawyers in the firm conform to the applicable rules of professional conduct.²⁵

The duty of supervision regarding non-lawyer assistants is not limited to lawyers having direct supervisory authority and is not limited to non-lawyers employed by or working in the firm. The duty also applies with respect to non-lawyers who are retained by or associated with a lawyer, whether or not the non-lawyer is working "in" the firm.²⁶ Thus, in several respects, all lawyers in the firm have an obligation with regard to supervising non-lawyer assistants, whether they are employees or independent contractors, and regardless of whether they are working domestically or abroad. Model Rule 5.3(a) requires partners and lawyers with comparable managerial authority in the firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the conduct of non-lawyer personnel is compatible with the professional obligations of the lawyer.²⁷ This obligation is broader than the obligation under Model Rule 5.1(a) to have reasonable measures ensuring appropriate lawyer conduct, which applies only to lawyers in the firm.²⁸ The duties under Rule 5.3(a) include supervising non-lawyers in a way that does not permit them to engage in the unauthorized practice of law.²⁹ A lawyer must also make reasonable efforts with respect to a non-lawyer over whom the lawyer has direct supervisory authority to ensure that the non-lawyer's conduct conforms to the professional obligations of the supervising lawyer.³⁰

23. ABA Form. Op. 88-356, *supra* note 12 (citing MODEL CODE OF PROF'L CONDUCT R. 5.1(b)).

24. MODEL CODE OF PROF'L CONDUCT R. 5.3(b) (2009) ("A lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.").

25. *See supra* note 22.

26. MODEL CODE OF PROF'L CONDUCT R. 5.3.

27. MODEL CODE OF PROF'L CONDUCT R. 5.3(a); *see also id.* cmt. 2.

28. MODEL CODE OF PROF'L CONDUCT R. 5.1(a); *see supra* note 15; *see also id.* cmt. 1.

29. MODEL CODE OF PROF'L CONDUCT R. 5.3(a).

30. MODEL CODE OF PROF'L CONDUCT R. 5.3(b); *see also id.* cmt. 1.

Responsibilities regarding non-lawyer assistants typically require more extensive and detailed supervision than the supervision of lawyers because most non-lawyer assistants lack legal training and the supervising lawyer remains responsible for ensuring that the work is performed competently, diligently and in conformance with the lawyer's ethical obligations. Rule 5.3(b) requires that the supervisory lawyer provide adequate instructions when assigning projects, monitor the progress of the project, and review the completed work.³¹ Thus, a lawyer who delegates work without continuous scrutiny and oversight does so at the lawyer's peril.³²

Even if there is no general or direct supervisory obligation, a lawyer may be responsible for another lawyer's violation of the rules or for the conduct of a non-lawyer employed or retained by, or associated with, the lawyer which would be a violation of the rules if engaged in by the lawyer if: (1) the lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it, or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or the non-lawyer is employed, or has direct supervisory authority over the lawyer or non-lawyer, and knows of such conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.³³ A lawyer's responsibility for the acts of a non-lawyer differs slightly from the lawyer's responsibility for another lawyer's ethical violations. Model Rule 5.3(c) specifies the circumstances in which the lawyer is responsible for conduct of a non-lawyer that would be a violation of the rules if engaged in by the lawyer, while Rule 5.1(c) defines the responsibility for another lawyer's violation of the rules.³⁴ A lawyer's responsibilities under Model Rule 5.1(c) are not limited to lawyers in the firm, whereas the responsibilities under Rule 5.3(c)(2) are limited to persons employed by the firm.³⁵

31. MODEL CODE OF PROF'L CONDUCT R. 5.3(b).

32. *See, e.g.*, *Crane v. State Bar*, 30 Cal. 3d 117, 123 (1981); *Mahoning County Bar Ass'n v. Lavelle*, 836 N.E.2d 1214, 1217 (Ohio 2005); *Lorain County Bar Ass'n v. Noll*, 821 N.E. 2d 988, 991 (Ohio 2004); *see also* RESTATEMENT (THIRD) LAW GOVERNING LAWYERS §11 cmt. f (2000).

33. MODEL CODE OF PROF'L CONDUCT R. 5.1(c); MODEL CODE OF PROF'L CONDUCT R. 5.3(c).

34. *Id.*; MODEL CODE OF PROF'L CONDUCT R. 5.1(c).

35. MODEL CODE OF PROF'L CONDUCT R. 5.1(c); MODEL CODE OF PROF'L CONDUCT R. 5.3(c)(2).

III. ETHICS OPINIONS ON OUTSOURCING LEGAL AND NON-LEGAL SERVICES

A. *ABA Formal Opinion 08-451*

A long-awaited opinion by the ABA Standing Committee on Ethics and Professional Responsibility concludes that there is nothing inherently unethical about outsourcing legal and non-legal support services, provided the outsourcing lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1³⁶ and the outsourcing arrangements are properly managed.³⁷ The ABA Committee addresses a very broad spectrum of outsourced work ranging from traditional “back office” administrative and litigation support services to the engaging of foreign lawyers to draft patent applications or develop legal strategy and prepare motion papers in U.S. litigation.³⁸

The ABA opinion describes the outsourcing trend as a salutary one for the global economy, citing the ability of lawyers and law firms to reduce labor and other costs by having outsourced services performed at lower rates by outside individuals or entities rather than by the lawyer’s own staff.³⁹ The opinion sees outsourcing as a means of enabling small firms to represent clients effectively and efficiently by engaging temporary lawyers and legal assistants on an as-needed basis.⁴⁰ The opinion concludes that there is no “unique blueprint” for providing competent legal services, as long as the outsourcing lawyer applies the necessary legal knowledge, skill, thoroughness, and preparation required by Model Rule 1.1.⁴¹ Thus, Rule 1.1 does not prohibit outsourcing work to independent service providers that are not under the direct control of the outsourcing lawyer.

The ABA Committee cautions that lawyers having “direct supervisory authority” over other lawyers and non-lawyers have additional obligations under Model Rules 5.1 and 5.3.⁴² However, the opinion does not describe what those responsibilities are in the context

36. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. MODEL CODE OF PROF’L CONDUCT R. 1.1.

37. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451 (2008).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

of outsourcing or under what circumstances each rule applies. The opinion focuses on the application of Rules 5.1(b) and 5.3(b) that deal with lawyers who have direct supervisory authority over other lawyers and non-lawyers.⁴³ The opinion does not address circumstances in which partners and lawyers with comparable managerial authority in a law firm have general management responsibilities for outsourced legal and non-legal support services.⁴⁴ The opinion correctly concludes that the obligation of lawyers who have direct supervisory authority over other lawyers applies regardless of whether the other lawyers are directly affiliated with the supervising lawyer's law firm.⁴⁵

The opinion implies there is a heightened duty of supervision when legal work is outsourced abroad. The duty of supervision for the outsourcing lawyer includes ensuring that tasks are delegated to service providers who are competent to perform them and to oversee the execution of the work adequately and appropriately. Although geographical separation and time differences may make the job of monitoring the work more difficult, the duty of supervision is not mitigated by the fact that the work is outsourced abroad or is being performed by foreign lawyers. The ABA Committee suggests that depending on the legal education, training, and professional regulatory system in the foreign jurisdiction, it may be more important than ever for the outsourcing lawyer to scrutinize the work done by foreign lawyers—"perhaps viewing them as non-lawyers before relying on the work and rendering legal services to the client."⁴⁶

The ABA Committee discusses several additional considerations that must be taken into account under the rules, including whether the client is entitled to notice that the client's legal work is being performed elsewhere, what circumstances require the client's informed consent to the engagement of outside lawyers or non-lawyers, how to safeguard confidential client information, and the treatment of fees charged by the outsourced service provider.⁴⁷ The Committee admonishes the

43. *Id.*

44. Specifically, the opinion refers to ABA Formal Op. 88-356, *supra* note 12, but does not provide guidance for determining when an independent lawyer to whom outsourced work is referred is considered a lawyer in the firm for purposes of MODEL CODE OF PROF'L CONDUCT R. 5.1.

45. ABA Formal Op. 08-451, *supra* note 6 ("...we do not believe that the drafters of the Model Rules intended to restrict the application of Rule 5.1(b) to the supervision of lawyers within 'firms' as defined in Rule 1.0(c). A contrary interpretation would lead to the anomalous result that lawyers who outsource have a lower standard of care when supervising outsourced lawyers than they have with respect to lawyers within their own firm.").

46. ABA Formal Op. 08-451, *supra* note 6.

47. *Id.*

outsourcing lawyer to be mindful of the duty to avoid assisting other persons in the unauthorized practice of law.⁴⁸ The opinion states, “ordinarily an individual who is not admitted to practice law in a particular jurisdiction may work for a lawyer who is so admitted, provided that the lawyer remains responsible for the work being performed and that the individual is not held out as being a duly admitted lawyer.”⁴⁹ The opinion concludes with a cautionary note that if the activities of the outsourced lawyer, non-lawyer, or intermediary are held to be the unauthorized practice of law, and the outsourcing lawyer facilitated it in violation of law by action or inaction, the outsourcing lawyer will have violated Model Rule 5.5(a).⁵⁰

B. *New York*

The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics issued the first formal ethics opinion specifically addressing the ethical implications of legal outsourcing to foreign lawyers.⁵¹ The opinion concludes that a New York lawyer may ethically outsource legal work overseas to “a non-lawyer,” if the New York lawyer rigorously supervises the non-lawyer to avoid aiding the unauthorized practice of law and ensures that the non-lawyer’s work contributes to the lawyer’s competent representation of the client.⁵² The New York City Bar Committee’s analysis is based on the concept that foreign lawyers not admitted to practice in New York are considered non-lawyers, citing to the then existing New York Code of Professional Responsibility.⁵³ The Committee reasons that the lawyer’s duty to closely supervise the work of non-lawyer assistants is critical to the lawyer avoiding aiding in the unauthorized practice of law.⁵⁴

The New York City Bar Committee agrees with the Los Angeles County Bar Association Committee that the outsourcing lawyer must review and supervise outside legal research and work product prepared by non-lawyers or outside entities and verify that the work is accurate,

48. *Id.*; See also MODEL CODE OF PROF’L CONDUCT R. 5.5(a) (2009) (“A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.” (emphasis added)).

49. ABA Formal Op. 08-451, *supra* note 6.

50. *Id.*

51. New York City Bar Comm. Formal Op. 2006-3, *supra* note 6.

52. *Id.*

53. See New York State Bar Ass’n Comm. on Prof’l Ethics Op. 721 (1999).

54. New York City Bar Comm. Formal Op. 2006-3, *supra* note 6.

relevant, and complete, including revising the work if necessary.⁵⁵ The opinion also cautions that the outsourcing lawyer must preserve client confidential information and avoid conflicts of interest when outsourcing, bill for outsourcing appropriately, and, when necessary, obtain advance client consent. The opinion concludes that a heightened degree of supervision is required when outsourcing work overseas to avoid assisting in the unauthorized practice of law and to ensure that the outsourcing lawyer represents the client competently.⁵⁶ The opinion suggests several salutary steps that lawyers should consider in discharging the duty to supervise the work of non-lawyers overseas.⁵⁷

The New York opinion has been criticized for giving questionable ethical guidance for attorneys outsourcing legal work to foreign countries.⁵⁸ For example, the opinion fails to answer whether foreign lawyers participate in the practice of law, how the public would be harmed if foreign lawyers did practice law, and whether measures beyond communication are needed to supervise foreign lawyers.⁵⁹

C. California

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee found that a lawyer in a civil case may contract with an out-of-state company to research and write an appellate brief, provided the lawyer is competent to review the work, remains ultimately responsible for the final work product filed with the court on behalf of the client, the lawyer does not charge an unconscionable fee, confidential client information is protected, and

55. *Id.*; Los Angeles County Bar Ass'n Formal Op. 518, *supra* note 6.

56. New York City Bar Comm. Formal Op. 2006-3, *supra* note 6 (The opinion notes the distinction in the New York Code between the obligation of a law firm to supervise the work of non-lawyers who "work at the firm," and the supervisory responsibilities of a lawyer for the conduct of a non-lawyer "employed or retained by or associated with the lawyer," but found that the provisions of the two rules were intended to be equivalent. "To conclude otherwise and make the individual lawyer, but not the law firm, responsible for supervising the overseas non-lawyer would be difficult to justify and could also easily lead to untoward results.").

57. *Id.* (Among the salutary steps in discharging the duty to supervise that New York lawyers should consider are (i) obtaining background information about intermediaries employing or engaging the non-lawyer, and obtaining the professional resume of the non-lawyer, (ii) conducting reference checks, (iii) interviewing the non-lawyer in advance by telephone, the Internet, or by web cast; and (iv) communicating with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and is discharging the assignment according to the lawyer's expectations.).

58. Keith Woffinden, *Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3*, 2007 BYU L. REV. 483, 510-13 (2007).

59. *Id.* at 510.

there is no conflict of interest between the client and the contracting entity.⁶⁰ The opinion concludes that contracting for out-of-state legal research and writing services by a separate entity does not constitute aiding and abetting the unauthorized practice of law in violation of California law because the contracted services assist the lawyer in representing the lawyer's client, provided the lawyer remains ultimately responsible for the final work product.⁶¹ The opinion does not discuss the duty of supervision except to note that the lawyer has a duty to act competently and to exercise professional judgment in the provision of legal services to or on behalf of the lawyer's client.⁶² The opinion interprets this to mean that the lawyer must be ultimately responsible for the work product and cannot delegate authority over strategy or final content of the work.⁶³

The San Diego County Bar Association Legal Ethics Committee has considered outsourcing legal work abroad in the context of a partner in a two-lawyer California litigation firm defending a complex intellectual property dispute and contracting with a firm in India to do legal research, develop case strategy, prepare deposition outlines and draft correspondence, pleadings and motions in the case.⁶⁴ The San Diego Committee follows the Los Angeles County Bar Association and City Bar of New York in concluding that, although the nature of the work the firm performed in India would constitute the unauthorized practice of law if foreign lawyers had done the work directly for the client, the fact that the work was contracted for by a California lawyer, who in turn exercised independent professional judgment in deciding how and whether to use the work on the client's behalf, did not result in the lawyer aiding the unauthorized practice of law in violation of California law.⁶⁵ The Committee pointed out that the duty of competence in California includes the duty to supervise the work of subordinate attorneys and non-attorney employees or agents.⁶⁶

60. Los Angeles County Bar Ass'n Formal Op. 518, *supra* note 6.

61. *Id.*

62. California does not currently have rules comparable to Model Rules 5.1 and 5.3 on supervising lawyer and non-lawyer assistants.

63. Los Angeles County Bar Ass'n Formal Op. 518, *supra* note 6.

64. San Diego County Bar Ass'n Formal Op. 2007-1, *supra* note 6.

65. *Id.* ("Thus, the attorney does not aid in the unauthorized practice of law where he retains supervisory control over and responsibility for those tasks constituting the practice of law. The authorities make it clear that under no circumstances may the non-California attorney 'tail' wag the California attorney 'dog.'").

66. *Id.*; see also CALIFORNIA RULES OF PROFESSIONAL CONDUCT R. 3-110, Discussion.

The San Diego Committee reasoned that, as long as the outsourcing lawyer is competent to evaluate the work performed by the outsourced contractor, retains control over the matter, exercises independent professional judgment, and retains ultimate responsibility for the work, the assistance contracted for does not constitute the unauthorized practice of law, whether the work is outsourced out-of-state or out-of-the-country.⁶⁷

The San Diego opinion cites to Model Rule 5.1(b), involving the duties of lawyers having direct supervisory authority over other lawyers.⁶⁸ However, the opinion does not explain how that rule applies in view of the Committee's reasoning that the firm in India was not retained as lawyers. The opinion concludes that there is a heightened obligation to supervise work done abroad because of geographical, cultural and legal differences.⁶⁹ The opinion cautions that California lawyers need to understand the educational background of the person performing the work—for example, is the provider a “lawyer” or “non-lawyer” in the foreign jurisdiction, and how do legal training and business practices differ.⁷⁰ Lawyers also need to know how the legal and ethical standards of the jurisdiction vary on issues such as confidentiality, privilege, and conflicts. Other factors that affect the adequacy of the outsourcing lawyer's supervision include: whether the non-lawyer can be disciplined or terminated by the outsourcing lawyer; whether the non-lawyer's compensation can be adjusted for poor performance; whether the non-lawyer has been educated or trained by a lawyer; whether the outsourcing lawyer has the ability to review the non-lawyer's work ethics and practices; whether the lawyer regularly provides input to the non-lawyer on his or her performance; and whether the lawyer has the ability or discretion to restrict or confine the non-lawyer's areas of work or scope of responsibility.⁷¹

D. Florida

The Florida State Bar Association Committee on Professional Ethics concluded in 2008 that outsourcing legal work to overseas lawyers and non-lawyers by Florida lawyers is not inherently improper and does not aid the unauthorized practice of law, provided lawyers in

67. San Diego County Bar Ass'n Formal Op. 2007-1, *supra* note 6 (“Legalworks (the India firm) was not retained as an attorney but to provide law-related assistance.”)

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

the Florida law firm provide adequate supervision.⁷² The Florida ethics committee pointed out that Florida Rule 4-5.3 requires direct supervision of non-lawyers employed or retained by an attorney and also requires the lawyer to make reasonable efforts to ensure that the non-lawyer's conduct is consistent with Florida's ethics rules.⁷³ The opinion concludes that these supervisory obligations apply regardless of whether the overseas provider is a lawyer or a non-lawyer paraprofessional.⁷⁴ The Committee agrees with the Los Angeles County Bar Association and the City Bar of New York that the outsourcing lawyer may need to take extra steps to ensure that foreign service providers are familiar with the ethics rules governing conflicts of interest and confidentiality.⁷⁵

E. North Carolina

The North Carolina State Bar agrees with New York and California that it is not inherently improper to outsource legal work abroad to foreign lawyers and non-lawyer assistants, provided the outsourcing lawyer complies with the duty of supervision under North Carolina's Rule 5.3(b), which requires that the lawyer make reasonable efforts to ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer.⁷⁶ The North Carolina opinion does not discuss Rule 5.1(b), impliedly agreeing with the ABA Committee that the outsourcing lawyer's duty of supervision is best satisfied if foreign lawyers to whom legal work is outsourced are viewed as non-lawyer assistants.⁷⁷ The opinion stressed that foreign services providers may not exercise independent legal judgment in making decisions on behalf of a client.⁷⁸

The North Carolina opinion expresses similar ethical concerns raised by the City Bar of New York and the Los Angeles and San Diego County Bar Associations concerning the outsourcing lawyer's ability to adequately supervise foreign lawyers and non-lawyer assistants.⁷⁹ The North Carolina opinion states: "In supervising the foreign assistant, the

72. Fla. State Bar Ass'n Proposed Advisory Op. 07-2, *supra* note 6.

73. *Id.*; see also RULES REGULATING THE FLORIDA BAR R. 4-5.3.

74. Fla. State Bar Ass'n Proposed Advisory Op. 07-2, *supra* note 6.

75. *Id.*; see also *supra* note 14 (the Florida Bar Ethics Department issued guidelines on offshoring legal services to assist members of the bar in regard to outsourcing under Op. 07-2).

76. N.C. State Bar Formal Op. 12, *supra* note 6; see also NORTH CAROLINA RULES OF PROFESSIONAL CONDUCT R. 5.3(b).

77. See ABA Formal Op. 08-451, *supra* note 6.

78. N.C. State Bar Formal Op. 12, *supra* note 6.

79. *Id.*

lawyer must review the foreign assistant's work on an ongoing basis to ensure its assignment is understood and that the foreign assistant is discharging the assignment in accordance with the lawyer's directions and expectations; and review thoroughly all work-product of foreign assistants to ensure that it is accurate, reliable and in the client's interests. The lawyer has an ongoing duty to exercise his or her professional judgment and skill to maintain a level of supervision necessary to advance and protect the client's interests."⁸⁰

F. Colorado

The Colorado Bar Association concluded that retaining domestic and foreign lawyers to provide temporary legal services is permitted under the Colorado rules, provided the Colorado lawyer makes reasonable efforts to ensure that the domestic or foreign lawyer is licensed and in good standing.⁸¹ Whether Colorado law permits a foreign lawyer to provide legal services without engaging in the unauthorized practice of law is beyond the scope of the opinion. However, the Colorado Bar Association recommends that a lawyer considering outsourcing work to a foreign lawyer initially determine that the foreign lawyer is a member of a recognized legal profession in the foreign jurisdiction, such that it is reasonable to treat the foreign professional as a "lawyer."⁸² The opinion relies on the conclusion reached in ABA Formal Opinion 01-423 on forming partnerships with foreign lawyers that, in order to qualify as a lawyer for purposes of Model Rule 5.4 (prohibiting the sharing of fees and forming a partnership with non-lawyers), a foreign professional "must be a member of a recognized legal profession in a foreign jurisdiction."⁸³

G. Ohio

The Ohio Rules of Professional Conduct do not prohibit Ohio lawyers from outsourcing legal or support services domestically or abroad, either directly or through an independent service provider, as long as the Ohio lawyer obtains the client's informed consent and verifies the legal service provider's ability to perform the services in

80. *Id.*

81. Colorado Bar Ass'n Form. Op. 121 (2009).

82. *Id.* at 5.

83. *Id.* at 6.

compliance with the Ohio lawyer's professional duties.⁸⁴ However, the opinion does not consider whether a particular outsourcing service involves the unauthorized practice of law. Nevertheless, the opinion concludes that a lawyer who outsources legal support services has responsibility for another lawyer's violation of professional obligations under Ohio Rule 5.1(c) if the outsourcing lawyer orders, or with specific knowledge of the conduct, ratifies, the conduct involved and has a responsibility to make reasonable efforts to ensure that a non-lawyer's conduct is compatible with the outsourcing lawyer's professional obligations under Ohio Rule 5.3(a).⁸⁵ The outsourcing lawyer is also responsible for a non-lawyer's conduct under Ohio Rule 5.3(c)(1) if the outsourcing lawyer orders, or with knowledge of the specific conduct ratifies the conduct involved.⁸⁶

IV. PROBLEMS WITH THE CURRENT APPROACH TO SUPERVISING LEGAL WORK OUTSOURCED ABROAD

Ethics opinions to date are fairly uniform in identifying the risks in offshore outsourcing and concluding that the risks are manageable as long as the outsourcing lawyer engages in a heightened level of supervision and assumes responsibility and control over the work.⁸⁷ The opinions are also fairly consistent in requiring lawyers to safeguard client information, avoid conflicts of interest, bill clients appropriately, disclose the outsourcing arrangement in most instances, and seek client consent where appropriate.⁸⁸

The overarching ethical concern in offshore outsourcing is the need to avoid aiding in the unauthorized practice of law by foreign lawyers and non-lawyer assistants. Although there are some variations among the ABA and state ethics opinions, most appear to take the same basic approach—the outsourcing lawyer is required or is encouraged to treat foreign lawyers as “non-lawyers” to avoid violating Model Rule 5.5(a)⁸⁹ (or the state's UPL law) and satisfy the lawyer's obligations as a direct

84. Ohio Supreme Ct. Bd. of Commissioners on Grievances and Discipline Form. Op. 2009-6 (2009).

85. *Id.* at 8.

86. *Id.*

87. *See, e.g., supra* notes 5 and 6.

88. *See, e.g., supra* notes 5 and 6.

89. MODEL CODE OF PROF'L CONDUCT R.5.5, cmt. 1 (2009) (the rule applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person); *see supra* note 48.

supervisor under Model Rule 5.3(b).⁹⁰ A consensus appears to have emerged that U. S. lawyers and law firms may not have an outsourcing arrangement with foreign lawyers in which a foreign lawyer is engaged, even temporarily, to perform legal work for clients of the outsourcing lawyer or the lawyer's law firm. Rather, the outsourcing lawyer must take responsibility for all of the outsourced work, adopting the services provided by the foreign lawyer as the U.S. lawyer's own work.

The ethics opinions have generally received favorable reviews and are seen by many as a "green light" to outsourcing overseas.⁹¹ While the opinions are useful and contribute to the growing consensus of the ethical considerations in offshore outsourcing of legal work and the importance of supervision, the ethical standard for managing offshore outsourcing in a changing global legal environment requires re-examination. Technology and market conditions are the primary enablers of offshore outsourcing of legal work. The way outsourcing has been viewed so far does not account for the globalization of the practice of the law and other developments that have motivated the recently-created ABA task force on Ethics 20/20. One of the issues the ABA Commission should study is whether the distinction between foreign and domestic lawyer supervision under the ethics rules will remain valid as technologies and market conditions transform the way law is practiced.⁹² Viewing foreign lawyers as non-lawyer legal assistants may be short-sighted in the changing global legal environment.

Although ABA Formal Opinion 08-451 makes reference to Model Rule 5.1(b), the opinion addresses the ethical implications of outsourcing generally without adequately distinguishing between the duty of supervision in outsourcing legal versus support services domestically and outsourcing these same types of services abroad.⁹³ The

90. MODEL CODE OF PROF'L CONDUCT R. 5.3(b).

91. See, e.g., Anthony Lin, *ABA Gives Thumbs Up to Legal Outsourcing*, Vol. 238 THE LEGAL INTELLIGENCER No. 42 (August 28, 2008); Martha L. Arias, *Internet Law: U.S. Employers Free to Outsource Legal Work*, INTERNET BUSINESS LAW SERVICES (September 8, 2008), available at http://www.ibls.com/internet_law_news_portal_view_prn.aspx?s=latestnews&id=2131; Matthew Banks, *ABA: Legal Outsourcing is Salutory and Ethically Allowable*, Aug. 27, 2008, <http://www.integreon.com/blog/2008/08/ABA-legal-outsourcing-is-salutory-and-ethically-allowable.html>.

92. The ABA Commission has identified as one of the preliminary issues for consideration and study the admission of foreign lawyers to practice in the United States and whether there are ethical issues or other policy positions regarding outsourcing that are not addressed in ABA Form. Op. 08-451. ABA Commission on Ethics 20/20 preliminary issues outline (Nov. 19, 2009), www.abanet.org/ethics2020.

93. ABA Formal Op. 08-451, *supra* note 6.

Los Angeles Bar Association Formal Opinion 518 also addresses the topic of outsourcing generally and does not discuss supervision outside the context of the individual lawyer's duty of competence.⁹⁴ The San Diego Bar Committee refers to Model Rule 5.1(b) but does not explain how that rule applies if lawyers in the foreign jurisdiction are considered non-lawyer assistants.⁹⁵ ABA Formal Opinion 88-356 considers the question whether temporary lawyers should be treated as associated with a law firm primarily in the context of imputation of conflicts of interest.⁹⁶ The opinion mentions the duty owed by direct supervisors under Model Rule 5.1(b), but does not mention the obligation of partners and managers to manage the work of temporary lawyers who are working within the firm.⁹⁷

There are a number of considerations and possible drawbacks in attempting to reformulate a workable ethical standard for supervising legal work performed by foreign lawyers. First, there is a lack of a standard definition of what constitutes the practice of law. The definition of the practice of law is established by law rather than by ethics rules and varies from one jurisdiction to another.⁹⁸ Whatever the definition may be, a lawyer does not currently violate Model Rule 5.5 by delegating work to paraprofessionals, so long as the lawyer supervises the delegated work and retains responsibility for the work under Model Rule 5.3.⁹⁹ According to several commentators, the UPL issue is next to impossible to resolve because UPL jurisprudence in the United States lacks coherence.¹⁰⁰

The ABA adopted a Model Rule for Temporary Practice by Foreign Lawyers in August 2002.¹⁰¹ This Model Rule applies to lawyers admitted in a non-United States jurisdiction who perform legal services in a U.S. jurisdiction on a temporary basis in association with a lawyer who is admitted to practice in the U.S. jurisdiction and who actively participates in the matter.¹⁰² The rule also applies when the matter is "reasonably related" to a foreign matter in which the foreign lawyer is involved, or when the client resides in a foreign jurisdiction, or when a

94. Los Angeles County Bar Ass'n Formal Op. 518, *supra* note 6.

95. San Diego County Bar Ass'n Formal Op. 2007-1, *supra* note 6.

96. ABA Formal Op. 88-356, *supra* note 12.

97. *Id.*

98. MODEL CODE OF PROF'L CONDUCT R. 5.5 cmt. 2 (2009).

99. *Id.*

100. Daly, *supra* note 14 at 427-28.

101. ABA Comm. on Multijurisdictional Practice, Report 201J to the House of Delegates (August 2002), available at <https://www.abanet.org/cpr/mjp/201j.pdf>.

102. *Id.*

matter is governed primarily by international or non-U.S. law.¹⁰³ To date, seven jurisdictions have adopted a rule that explicitly refers to foreign lawyer temporary practice.¹⁰⁴ The ABA has also adopted a Model Rule for the licensing of foreign legal consultants.¹⁰⁵ More states may be motivated to adopt the Foreign Lawyer Temporary Practice Rule as law firms continue to restructure and there is greater globalization of routine legal services.¹⁰⁶ The Ethics 20/20 task force may be able to improve on these Model Rules regarding foreign lawyer practice and the regulation of the legal profession in the context of globalization.

Another factor in re-examining the standard of supervision for outsourced legal work to foreign lawyers is what constitutes a “law firm” in today’s practice. Recent economic and global developments have raised significant challenges for the traditional law firm model. Technology, regulatory changes abroad, and market conditions suggest that the current law firm model will not survive without change. Some have argued that the classic partnership model in which lawyers associate together to share risks and rewards in a common venture no longer describes how law firms actually function, particularly firms with multijurisdictional practices.¹⁰⁷ Law firms today are much more diversified in terms of practice areas, categories of partners, and management structures. Firms are under significant pressure to provide legal services more efficiently and are facing greater competition domestically and abroad. According to Professor Regan, as firms compete for business, they are beginning to disintegrate legal work into more discrete tasks and to assign each task to the lowest-cost provider both inside and outside the firm.¹⁰⁸ “Large chunks of work can even be

103. *Id.*

104. Delaware, Florida, Georgia, New Hampshire, Pennsylvania and Virginia. In addition, North Carolina’s rule appears to permit temporary practice by foreign lawyers in that jurisdiction by omitting reference to the word “U.S. jurisdiction” in its version of Rule 5.5. Illinois recently announced the adoption of an unauthorized practice of law and multijurisdictional rule based on Model Rule 5.5 that provides a safe haven for foreign lawyers.

105. See ABA MODEL FOREIGN LEGAL CONSULTANTS RULE (2006), available at <http://www.abanet.org/cpr/mjp/recommendations.pdf>.

106. ABA Center for Prof’l Responsibility Policy Implementation Comm. (2009), available at http://www.abanet.org/cpr/mjp/for_legal_consultants.pdf (30 jurisdictions currently have a foreign legal consultant rule. However, many of these rules vary significantly from the ABA Model Foreign Legal Consultants Rule).

107. See, e.g., Milton C. Regan, Jr., *Lawyers, Symbols, and Money: Outside Investment in Law Firms*, 27 PENN ST. INT’L L. REV. 407, 407 (2009) (“...firms over the past twenty-five years increasingly have departed from the classic partnership model in substance, even as they largely have remained partnerships in form. We can loosely characterize this as a movement toward more of a corporate organizational model.”).

108. *Id.* at 421-22.

delegated to persons outside the firm, such as contract lawyers in the United States or abroad.”¹⁰⁹

In devising a standard for managing offshore outsourcing, it would be appropriate to consider whether the general duty of supervision under ABA Model Rules 5.1(a) and 5.3(a) should continue to apply to lawyers who are partners in the law firm but who do not have managerial authority over the professional work of the firm. It is also worth considering whether the obligation under the rule should continue to apply to lawyers who have intermediate managerial responsibilities that do not amount to direct supervisory authority over other lawyers. It may be more practicable to allow these types of lawyers to delegate supervisory responsibilities to other lawyers in the firm who have appropriate managerial authority and the capacity to carry out the obligations under these rules.¹¹⁰ It may be appropriate for the ABA 20/20 task force to also look at whether the regulation of the legal profession in a global legal environment should include regulation of law firms as well as lawyers.¹¹¹

Some predict that the Legal Services Act in the United Kingdom will have far-reaching consequences on the legal profession, particularly the provision allowing the formation of Alternative Business Structures.¹¹² It has also been suggested that ABS will have a significant effect on the growth of offshore legal outsourcing.¹¹³

An overarching issue in arriving at an appropriate ethics standard is how public protection concerns will be satisfied. Who will regulate the outsourced lawyers in the globalized practice of law? In considering the regulation of law firms in a global legal environment, much of the focus

109. *Id.* at 422.

110. *E.g.*, RESTATEMENT (THIRD) LAW GOVERNING LAWYERS §11 cmt. d (2000) (permits delegation of supervisory duties to lawyers in the firm with the capacity to exercise managerial and supervisory responsibility, or to a management committee or similar body, unless the lawyer is aware that the delegated person or body is not providing adequate measures or supervision, in which case the lawyer must take reasonable remedial measures); Cal. State Bar Proposed Amendment to the Rules of Professional Conduct Rule 5.1(a) (2006) (applies to lawyers who have managerial authority over the professional work of a law firm and not to all partners).

111. In New York and New Jersey, law firms as well as lawyers may be disciplined. *See, e.g.*, York City Bar Comm. Formal Op. 2006-3, *supra* note 6; NEW JERSEY RULES OF PROFESSIONAL CONDUCT R. 5.3 (2003).

112. Legal Services Act, 2007,c.29 (U.K.), available at http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_1

113. *Id.*; *see also* Mark Ross, et al., *Legal Process Outsourcing (LPO): 2007 and Beyond* ABA Law Practice Management Section Law Practice Today, Feb. 2008, available at <http://www.abanet.org/lpm/lpt/articles/mgt02081.shtml>.

so far has been on Model Rule 5.4 and multidisciplinary practice.¹¹⁴ However, the impact of globalization and technologies on the duty of supervision by partners, managers, and supervisory lawyers should also be addressed. Until then, perhaps it is safest for lawyers to continue to consider foreign lawyers as non-lawyers in outsourcing legal work abroad to avoid violating the ethics rules.

114. MODEL CODE OF PROF'L CONDUCT R. 5.4 (2009) (professional independence of a lawyer, among other things, precludes a lawyer from forming a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law and prohibits the sharing of legal fees with non-lawyers except as provided in the rule).

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